Mohamed Ismail bin Mohamed Shariff v Zain Azahari bin Zainal Abidin & Ors

FEDERAL COURT (PUTRAJAYA) — CIVIL APPEAL NO 02()-6 OF 2011(W)
ARIFIN ZAKARIA CHIEF JUSTICE, HASHIM YUSOFF AND ABDULL HAMID EMBONG FCJJ
15 FEBRUARY 2013

Civil Procedure — Appeal — Appeal to Federal Court — Partners shares in firm — Agreement that retirement or death of any partner would not dissolve partnership — Valuation of retiring partner's share in firm — Conflicting valuations — Whether valuation of both goodwill of firm as well as assets or only goodwill — Duty of trial court in conflicting valuation reports

The appellant, the first respondent and one Lai Kee Chung ('Lai') were the founding partners of the Messrs Zain & Co ('the firm') with the first respondent holding a 70% equity, whilst the appellant and Lai each held 15% equity in the firm. It was agreed that the retirement or death of any partner would not have the effect of dissolving the partnership and none of the partners would have the right at any time for any cause whatsoever to determine the partnership. On his retirement, the appellant requested for his share in the firm as at the date of his retirement to be valued. The audited accounts of the firm showed that the appellant owed the firm the sum of RM327,096. The appellant was informed that the outstanding amount presently due from him was RM320,096 after taking into account the sum of RM7,000 deducted from fees paid by Tobisma Corp. The appellant was asked how he proposed to settle the amount of RM320,096 owing by to the firm which was to be paid one year before his retirement. Although the appellant admitted that the amount he owed was RM320,096 and that it was payable within one year of his retirement, he stated that the value of his share in the firm at the time of his retirement would be in excess of the amount due in his current account. The auditors made a determination of what was due to the appellant on his retirement on but it was determined that the net amount of RM215,521 was due from the appellant to the respondents instead. Aggrieved by the valuation of his entitlement, the appellant filed an action in the High Court against the respondents claiming for value of his share in the firm. The High Court dismissed the whole of the appellant's claim except the claim for 5% absolute shares of the firm's net profit. The appellant then filed an appeal to the Court of Appeal against the decision of the High Court and the appeal was dismissed with costs. In the present appeal, the issues that arose for determination were whether the value of a retiring partner's share in the firm as at the date of his retirement was the valuation of both the goodwill of the firm as well as the

assets of the firm or only the goodwill; and whether it was the duty of the trial court when faced with the conflicting valuation reports to consider and rule upon the views as expressed in all the reports and hand down its reasoned decision on the issue as opined upon it in all the reports so as to accord transparency to the said decision.

Held, dismissing the appeal with costs:

(1) It was indisputable that the assets of the firm belonged to all the partners of the firm. The appellant himself had accepted the recommendations of the AA Report without qualification as evidenced by his own letter. The appellant was therefore estopped from denying that he was bound by what he himself had agreed to. Such a finding of fact by the Court of Appeal did not warrant any appellate intervention (see para 43).

(2) The AWS Report, the AA Report and the AA goodwill computation were not done specifically for court proceedings. They were commissioned by the partners of the firm at the material time for a specific purpose of the partnership. These reports were done well before the appellant commenced his legal proceedings. As opposed to the three reports, the LYK Report was prepared by a witness for the appellant for the purpose of court proceedings to give 'expert evidence' for the appellant. As SP2 had not prepared a written report at that stage, the learned trial judge directed him to do so as a matter of expediency. It is also trite law that the trial judge who had the advantage of observing the demeanor of the witnesses would be in a better position than an appellate court to assess the value of the evidence given, and the appellate court should be slow to interfere with the trial judge's findings (see paras 48–49).

(3) As the apex court, it is trite law that the court was entitled to review the whole evidence before the court in totality to prevent any injustice. The court had therefore taken into account the LKY Report and considered it against the AWS Report and the AA Reports. The findings of facts on the valuation of the firm based on the surplus profit method by the trial Judge as endorsed by the Court of Appeal were not in error. There was no merit for appellate intervention on these findings of facts in the instant appeal (see para 51).

[Bahasa Malaysia summary

Perayu, responden pertama dan Lai kee Chung ('Lai') merupakan rakan kongsi pengasas Tetuan Zain & Co ('firma tersebut') yang mana responden pertama memegang 70% ekuiti manakala perayu dan Lai setiap seorang memegang 15% ekuiti dalam firma tersebut. Adalah dipersetujui bahawa persaraan atau kematian mana-mana rakan kongsi tidak akan menjejaskan pembubaran perkongsian itu dan tiada sesiapa daripada rakan kongsi itu akan mempunyai hak pada bila-bila masa untuk apa-apa sebab pun untuk menentukan

perkongsian itu. Semasa persaraannya, perayu meminta agar sahamnya dalam firma tersebut sehingga tarikh persaraannya itu dinilai. Akaun firma yang diaudit menunjukkan bahawa perayu berhutang kepada firma tersebut sejumlah RM327,096. Perayu diberitahu bahawa baki jumlah terkini yang perlu dibayar olehnya adalah RM320,096 setelah mengambil kira jumlah RM7,000 yang dipotong daripada fi yang dibayar oleh Tobisma Corp. Perayu disoal bagaimana dia bercadang untuk menyelesaikan jumlah RM320,096 yang dia berhutang kepada firma tersebut yang perlu dibayar setahun sebelum pesaraannya. Walaupun perayu mengakui bahawa jumlah yang dia berhutang adalah RM320,096 dan ianya perlu dibayar dalam tempoh setahun persaraannya, dia menyatakan bahawa nilai sahamnya dalam firma tersebut pada masa persaraannya akan melebihi jumlah yang perlu dibayar dalam akaun semasanya. Juruaudit-juruaudit membuat penentuan apa yang perlu dibayar kepada perayu semasa persaraannya tetapi sebaliknya ia telah ditentukan bahawa jumlah bersih RM215,521 yang perlu dibayar daripada perayu kepada responden-responden. Terkilan dengan penilaian haknya, perayu memfailkan tindakan di Mahkamah Tinggi terhadap responden-responden menuntut nilai sahamnya dalam firma tersebut. Mahkamah Tinggi menolak keseluruhan tuntutan perayu kecuali tuntutan 5% daripada saham mutlak keuntungan bersih firma tersebut. Perayu kemudian telah memfailkan rayuan kepada Mahkamah Rayuan terhadap keputusan Mahkamah Tinggi dan rayuan itu telah ditolak dengan kos. Dalam rayuan ini, isu-isu yang timbul untuk ditentukan adalah sama ada nilai saham rakan kongsi yang ingin bersara dalam firma tersebut sehingga tarikh persaraannya adalah penilaian berdasarkan nama baik firma tersebut dan juga aset-aset firma tersebut atau hanya nama baik; dan sama ada ia adalah kewajipan mahkamah bicara apabila berhadapan dengan laporan penilaian yang bercanggah untuk mempertimbangkan dan memutuskan atas pendapat yang dinyatakan dalam semua laporan dan menyampaikan keputusan munasabah atas isu sebagaimana dinyatakan pendapatnya berhubung di dalam semua laporan itu agar dapat memberikan ketelusan terbadap keputusan tersebut.

Diputuskan, menolak rayuan dengan kos:

(1) Adalah tidak boleh dipertikaikan bahawa aset-aset firma tersebut milik semua rakan kongsi firma tersebut. Perayu sendiri telah menerima cadangan Laporan AA tanpa syarat sebagaimana dibuktikan dalam suratnya sendiri. Perayu dengan itu diestop daripada menafikan bahawa dia terikat dengan apa yang telah dipersetujuinya sendiri. Penemuan fakta sedemikian oleh Mahkamah Rayuan tidak mewajarkan apa-apa campur tangan rayuan (lihat perenggan 43).

(2) Laporan AWS, Laporan AA dan nama baik AA tidak dibuat khususnya untuk prosiding mahkamah. Ia telah dibuat oleh rakan kongsi firma tersebut pada masa matan untuk tujuan spesifik perkongsian. Laporan-laporan tersebut telah dibuat sebelum perayu memulakan

prosiding undang-undangnya. Berlainan dengan tiga laporan tersebut, Laporan LYK telah disediakan oleh saksi perayu bagi tujuan prosiding mahkamah untuk memberikan 'expert evidence' untuk perayu. Oleh kerana SP2 tidak menyediakan laporan bertulis di peringkat tersebut, hakim bicara yang bijaksana telah mengarahnya berbuat demikian dengan segera. Adalah undang-undang nyata bahawa hakim bicara yang mempunyai kelebihan meneliti perilaku saksi-saksi akan berada dalam kedudukan lebih baik daripada mahkamah rayuan untuk menilai keterangan yang diberikan, dan mahkamah rayuan tidak sepatutnya campur tangan dengan penemuan hakim perbicaraan (lihat perenggan 48–49).

(3) Sebagai mahkamah tertinggi, adalah undang-undang nyata bahawa mahkamah berhak menyemak semula keseluruhan keterangan di hadapan mahkamah secara keseluruhan untuk mengelak apa-apa ketidakadilan. Mahkamah dengan ini mengambil kira Laporan LKY dan mempertimbangkannya dengan Laporan AWS dan Laporan AA. Penemuan fakta berhubung penilaian firma tersebut berdasarkan cara keuntungan lebihan oleh hakim bicara sebagaimana diendorskan oleh Mahkamah Rayuan tidak silap. Tiada merit untuk campur tangan rayuan atas penemuan-penemuan fakta dalam rayuan ini (lihat perenggan 51).]

Notes

For cases on appeal to Federal Court, see 2(1) *Mallal's Digest* (4th Ed, 2012 Reissue) paras 870–893.

Cases referred to

Boustead Trading (1985) Sdn Bhd v Arab-Malaysian Merchant Bank [1995] 3 MLJ 331, FC (refd)

Gan Yook Chin (P) & Anor v Lee Ing Chin @ Lee Teck Seng & Ors [2005] 2 MLJ 1, FC (refd)

Appeal from: Civil Appeal No W-02–57 of 2005 (Court of Appeal, Putrajaya)

N Chandran (S Jeya Palan & Rajan A Applasamy with him) (Maxwell Kenion Cowdy & Jones) for the appellant.

Porres P Royan (T Sudhar with him) (Shook Lin & Bok) for the respondents.

Hashim Yusoff FCJ (delivering judgment of the court):

[1] This court had granted leave to the appellant on two questions of law viz:

(i) whether on its true and proper construction of the report of Azman, Wong, Salleh & Co ('AWS Report') dated 18 November 1985 and titled 'ZAIN & CO VALUATION OF goodwill' constitutes a report on the

valuation of goodwil of the firm only or also the valuation of all the other assets of the firm including goodwill?

(ii) is the court when faced with conflicting expert reports, including such reports as specifically directed by it to be produced and tendered in court, required in law to consider and rule upon the views as expressed in all the reports and hand down its reasoned decision on the issues as opined upon in all the said reports so as to accord transparency to the said decision?

THE BACKGROUND FACTS

[2] Messrs Zain & Co ('the firm') is a firm of solicitors in Kuala Lumpur. The appellant was a partner of the firm from 1 November 1970–31 December 1988, when he retired as a partner of the firm.

[3] The first respondent and the appellant together with one Lai Kee Chung ('Lai') were the founding partners of the firm with the first respondent holding a 70% equity, whilst the appellant and Lai each held 15% equity in the firm. It was agreed that the retirement or death of any partner shall not have the effect of dissolving the partnership and none of the partners shall have the right at any time for any cause whatsoever to determine the partnership. Lai retired from the firm on 30 November 1976.

[4] The second and third respondents were admitted as partners of the firm on 1 January 1980. They were informed, when invited to become partners in late 1979 by the first respondent, that their respective shares in the firm would be 12% and 11% and that their respective shares would be valued. They would not have to pay immediately for their respective shares but the values would be debited to their respective capital accounts.

[5] The auditors valued the firm as at 1 January 1980 at RM1,500,000 and the report is dated 18 November 1985. The auditors used 'the surplus profit' method of valuation of the firm, an accepted method of valuation of a professional practice. The valuation of the firm at RM1,500,000 was accepted by both the appellant and the respondents.

[6] Immediately prior to the admission of the second and third respondents as partners, the appellant held 40% equity and the first respondent held 60% equity of the firm. Therefore the value of their respective shares as at 1 January 1980 was RM600,000 and RM900,000.

[7] Upon admission of the second and third respondents as partners of the firm on 1 January 1980, the appellant and the first respondent divested 6.5% and 16.5% of their shares respectively. Thus, 23% equity of the firm was divested to the new partners, ie 12% to the second respondent and 11% to the

third respondent. From this exercise, the appellant was entitled to a sum of RM97,500, being the value of 6.5% of his shares which he divested to the second and third respondents, and correspondingly the first respondent was entitled for a sum of RM247,500 being the value of 16.5% of his shares which he divested to the second and third respondents.

[8] In 1985, the firm appointed new auditors viz, Arthur Anderson & Co who were instructed to undertake a review of the firm's partnership structure. They produced a report dated 3 October 1986 ('the AA Review and Evaluation Report of 1986'), wherein 'goodwill' was defined.

[9] On 22 November 1986, the partners of the firm at the material time (including one Mr Lloyd Fernando) met and discussed the report. The partners accepted the report subject to the reservation that, in the event of the value of the share of any retiring partner on the time of retirement was lower than its value, at the time of acquisition, the deficit need not be paid by the retiring partner, provided his retirement was after two years of his admission to the partnership.

[10] On his retirement, on 31 December 1988 as a founding partner, the appellant requested for his share in the firm as at the date of his retirement to be valued. The firm forwarded to him a copy of the audited accounts of the firm as at 31 December 1988. It showed that the appellant owed the firm the sum of RM327,096. However the firm, in a covering letter dated 4 October 1989 forwarding the said account, informed the appellant that the outstanding amount presently due from him was RM320,096 after taking into account the sum of RM7,000 deducted from fees paid by Tobisma Corp. The appellant was asked how he proposed to settle the amount of RM320,096 which was then owing by the appellant to the firm, and according to the auditors' report was supposed to be settled within one year from his retirement. The appellant in his reply, did not dispute the amount he owed was RM320,096 and that it was payable within one year of his retirement, but stated that he believed the value of his share in the firm at the time of his retirement would be in excess of the amount due in his current account.

[11] By a document dated 20 September 1990, the Arthur Anderson auditors made a determination of what was due to the appellant on his retirement on 31 December 1988. However it was the auditors' determination that the net amount of RM215,521 was due from the appellant to the respondents instead.

PROCEEDINGS IN THE HIGH COURT

[12] The appellant was aggrieved about the valuation of his entitlement on

his retirement from the firm. He therefore filed an action in the High Court against the respondents making various claims as constituting the value of his share in the firm. The respondents filed a counterclaim of RM62,000 against the appellant from the value of the car registration No BBT 55.

[13] On 10 December 2004, the High Court dismissed the whole of the appellant's claim except the claim for 5% absolute shares of the firm's net profit but limited the same only from 1 January 1989–31 December 1989. The learned High Court judge allowed the respondents' counterclaim.

PROCEEDINGS IN THE COURT OF APPEAL

[14] Thereafter, the appellant filed an appeal to the Court of Appeal against:

(a) the whole decision of the High Court in dismissing the appellant's prayers for declarations, orders and claims, save as to the 5% absolute share in the firm's net profit;

(b) that part of the decision of the High Court in deciding that the appellant is only entitled to the 5% absolute shares of the firm's net profits for the period of one year only ie from 1 January 1989–31 December 1989 and not also to those of the subsequent years, and

(c) the decision of the High Court in granting the respondents' counterclaim of RM62,000 with costs.

[15] The respondents also filed a cross appeal against the decision of the High Court in deciding that the appellant was entitled to the 5% absolute share of the firm's net profits.

[16] On 6 November 2009 the Court of Appeal dismissed the appellant's appeal with costs and allowed the respondents' cross-appeal with no order as to costs.

THE ISSUES IN THIS APPEAL

[17] The appellant's appeal before us involves the determination on the true and proper construction of the Azman, Wong, Salleh & Co ('AWS') report, ie whether it was a valuation of only the goodwill or a valuation of the entire firm of Zain & Co. In other words, the issue is whether the value of a retiring partner's share in the firm as at the date of his retirement is the valuation of both the goodwill of the firm as well as the assets of the firm or only the goodwill?

[18] It also involves the issue as to the duty of the trial court when faced with the conflicting valuation reports to consider and rule upon the views as

expressed in all the reports and hand down its reasoned decision on the issue as opined upon it in all the reports so as to accord transparency to the said decision.

[19] Further this instant appeal concerns the effect of the Court of Appeal's decision in endorsing the trial judge's decision given without a reasoned decision and without the Court of Appeal itself considering the reports and giving its independent ruling on the basis thereof so as to avoid any injustice to the appellant.

THE CASE FOR THE APPELLANT

[20] Learned counsel for the appellant submitted that the respondents' contention that the appellant's entitlement on his retirement from the firm on 31 December 1988 was limited only to the value of the goodwill of the firm and not the value of the goodwill and the assets of the firm on the basis of the Azman, Wong, Salleh & Co (AWS) Report is incorrect.

[21] He submitted that there were four valuation reports done viz:

(a) the 'Zain & Co Valuation of Goodwill' as at 1 January 1980 by Azman, Wong, Salleh & Co ('AWS Report 1985');

(b) the Review and Evaluation of the Partnership of Zain & Co by Arthur Anderson & Co ('AA Report 1986');

(c) the goodwill computation dated 20 September 1990 by Arthur Anderson & Co ('AA Report 1990'); and

(d) the report by Lee Yat Kong from Wong, Lee & Co ('LYK Report 1995') as directed by the trial judge.

[22] It was further submitted that the AA Report 1990 was only a valuation of the goodwill of the firm and did not include its assets. Therein, the amount of goodwill by the appellant was stated as RM502,000. Likewise in the AA Report 1986, the valuation was also for goodwill only and did not include the assets of the firm.

[23] In the AA Report 1986, 'goodwill' was defined 'as that element of premium that can be attached to a business due to certain attributes of the business which may include, inter alia, the following:

(a) the reputation and the business contacts of the founding partners;

(b) the existing reputation and image of the firm and its range of services;

(c) the location of the business; and

(d) the existing clientele of the business.

[24] Counsel submitted that both goodwill and the other assets of the firm go to make up the value of the share; goodwill alone does not represent the value of the appellant's share. The assets have also to be valued before the value of the appellant's share could be determined.

[25] It was also contended by learned counsel for the appellant that the learned trial judge did not consider all the reports presented before the court, in particular the LYK Report 1995, prepared by the appellant's witness, SP2.

THE CASE FOR THE RESPONDENTS

[26] Learned counsel for the respondents however submitted that the learned trial judge had rightly rejected the appellant's claim that the assets of the firm belonged to the appellant and the first respondent exclusively. It was contended that the position of a partner on his retirement was covered by the AA Report. The appellant himself had accepted the recommendations of the AA Report without any qualification. Therefore the appellant is now estopped from denying that he was bound by what he himself had agreed to.

[27] It was further submitted by learned counsel that the appellant was not entitled to such share of the profits made since the dissolution of the partnership on 31 December 1988 as may be attributable to his share of the partnership assets. Upon retirement from a partnership, a partner's entire share in the firm must be dealt with irrespective of whether it is an 'absolute share' or not in the absence of any unequivocal agreement to the contrary which is not illegal or against public policy.

[28] The respondents' counsel also submitted that the term 'goodwill' calculated according to the 'surplus-profits' method referred to the value of the entire firm. He referred to the evidence of SD4, a chartered accountant from the firm of Azman, Wong, Salleh & Co in relation to the ASW Report wherein SD4 said:

> goodwill in the context of a legal firm is valuation of the practice at that point of time. The valuation is based on surplus profit method which is considered as the best method in valuing a business like legal practice. In arriving at the profit the assets of the practice has already been effected or taken into account of the profit of the practice. In the report I use the term goodwill to denote the value of the practice.

[29] Under cross-examination SD4 stated that he did not agree that in calculating the valuation of the purchase through the surplus profit method that he did not take into account the assets of the practice (see AR Vol 3 at

p 370). When asked what were the assets of the firm, SD4 said, 'The tangible assets would have been fixed assets like tables, chairs, vehicles, letters, work in progress, amount due by purchasers to the firm, bills rendered but not paid'.

[30] Learned counsel for the respondents also referred to the evidence of SD5 who prepared the AA Report 1986. SD5 had said in his evidence (see AR Vol 3, pp 371–372) that:

> The concept of goodwill is the same concept of the firm based on surplus profit concept. … If this surplus profit method is used its value include the assets, liabilities and profits in arriving at the value of the firm.
>
> In accounting pertaining the acceptable meaning of goodwill — carries two meanings, one the entire valuation of the practice and two is goodwill as a specific assets in the balance sheet of the entity. In this case the understanding is that if this method is used it refers to entire valuation of the practice.

THIS COURT'S DECISION

[31] It appears that there are conflicting valuation reports regarding the value of the appellant's share upon his retirement on 31 December 1988.

[32] From the four reports produced before the High court, three of them, ie the AWS Report 1985, the AA Report 1986 and the AA Report 1990 are based on the surplus-profit method of valuation and are in favour of the respondents. The fourth report (LYK Report 1995) however is in conflict with the other three reports.

[33] In the LYK Report 1995, Lee Yat Kong from the Public Accountancy Co of Wong, Lee & Co, in giving evidence for the appellant, had commented on the other three reports. Briefly, the LYK Report 1995, found that:

(a) the AWS Report 1985, has not taken into account other assets besides goodwill of the firm for the following reasons:

  (i) AWS Report clearly shows that it was a valuation of only the goodwill of Zain & Co and not a valuation of the firm itself including goodwill and all other assets of the firm;

  (ii) the assets of the firm at the material time on 1 January 1980 comprised of:

    (A) goodwill;

    (B) capital;

    (C) fixed assets;

(1) library books;

A (2) furniture and fittings;

(3) office equipment;

(4) renovation and partition;

B (5) motor vehicles;

(D) bills rendered but unpaid;

(E) work done but not billed;

C (F) work in progress;

(G) disbursements advanced to clients;

(H) other monies owing to clients; and

D (I) any other assets;

(b) the AA Report 1990 is incomplete and incorrect because it is a computation of only the goodwill of the appellant and is not a valuation of the appellant's share in the firm at the date of his retirement on 31 December 1988;

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(c) likewise the AA Report 1986, did not value the firm, as their basis of valuation was the same as the AWS Report 1985, which only valued goodwill of the firm; and

F (d) similarly, the AA Report 1990, did not value the firm but only its goodwill as their basis of valuation was the same as the AWS Report 1985.

[34] The LYK Report 1995 suggested that in the circumstances a proper valuation of the assets of the firm should be carried out separately to determine G the value of the appellant's share.

[35] It had referred to the book *'The Valuation of Company Shares and Business'* by AV Adamson and MG Correy (4th Ed), particularly to Chapter 6 therein, regarding 'CONSIDERATION OF METHODS OF H VALUATION'. Under the said chapter, at p 52, under 'Classification of Methods' it states, 'In all of these instances, the total value of the business is arrived at by adding to the calculation of goodwill the estimated value of tangible assets'.

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[36] Unfortunately we do not have the full grounds of judgment of the trial judge who had since passed away. But the Court of Appeal held that there was no dispute that after a full trial, the learned trial judge made the following findings on 10 December 2004:

goodwill computation of firm by AA through report dated 20 September 1990 (second report by AA) AB2 550 was based on surplus-profit method took into consideration of all the assets of the firm. Goodwill valuation computation is such that the value of the whole firm was taken into account. This is clear from SD5's evidence. The contention of the plaintiff that the report did not take into consideration assets of the firm is devoid of any merit and as such rejected. For this reason I rule that the plaintiff is not entitled to a declaration that assets of the firm belongs to the plaintiff and first defendant only and as such the second and third defendants are liable for the use of assets of the firm. This contention is rejected and the claim is dismissed in respect of this contention.

The plaintiff's claim for payment of other assets is also dismissed. The plaintiff also claimed that the sum of RM69,309 for initial goodwill which was debited in the plaintiff's account was wrongly done. This is against the evidence by the accountant. I therefore find that on evidence this was not wrongly debited and as such question of reversing the debit does not arise. This claim is also dismissed.

As regards the plaintiff's claim for payment of absolute share of 5% I am of the view this claim should be allowed. However the plaintiff is not entitled for the payment forever as he has retired from the firm. I am of the opinion that a reasonable period for the plaintiff to be paid is one year from the date of his retirement in line with the agreement between the parties that whatever that is owed by the firm to the plaintiff must be paid within one year from his retirement and likewise it was also the arrangement between parties that whatever the plaintiff owes to the firm must also be settled within one year from his retirement. An account of this entitlement of 5% absolute share must be prepared by an accountant acceptable by both parties. With consent of both parties, the parties are to appoint an accountant to assess the value of the 5% absolute share for one year ending 31 December 1989 or alternatively, the absolute share is to be sold back to the existing partners as first choice. The firm must pay interest of 8%pa on this value commencing 1 January 1989 to date of full settlement.

The plaintiff's claim for balance of payment of goodwill in the sum of RM346,799 is disallowed.

Counterclaim

Counterclaim is only allowed for RM62,000 for the price of the car with interest of 8%pa from 1 January 1989 until full settlement of RM62,000 by the plaintiff or until surrender of the car to the defendants.

Costs

No order as to costs.

[37] The Court of Appeal was also unanimous in its findings that having perused the record of appeal and the testimony of the accountant in the trial court, in particular the testimonies and reports of Abdul Wahab bin Jaffar (SD4) and Abdul Samad bin Hj Alias ('SD5'), that the 'surplus-profit' method of computation is the best method in valuing a business in the nature of a legal practice. In this method of computation, 'goodwill' is not treated as a specific asset in the balance sheet of the firm.

[38] 'Goodwill' according to the 'surplus-method' refers to the value of the entire firm (ie the legal practice). This would mean that all the assets of the firm were taken into consideration when computing 'goodwill' in the AA Report dated 20 September 1990.

[39] This was the decision of the Court of Appeal in finding no reason to disturb the findings of fact by the learned trial judge based on the evidence before him, in particular the testimonies of the accountants, SD4 and SD5.

[40] In his evidence, SD4 had testified that 'goodwill in the context of a legal firm is valuation of the practice at that point of time. The valuation is based on surplus profit method which is considered as the best method in valuing a business like a legal practice. In arriving at the profit the assets of the practice have already been effected or taken into account of the profit of the practice. In the report I use the term goodwill to denote the value of the practice'.

[41] SD4's testimony is supported by that of SD5's who said:

> The concept of goodwill is the same concept of the firm based on surplus profit concept. Based on this concept I valued the practice as a going concern which assumes the first has control over assets and liabilities and arising out of the operation it is generating profit. If this surplus method is used, its value *includes the assets, liabilities and profit in arriving at the value of the firm*. (Emphasis added.)

[42] This can be perceived from the evidence of SD4 and SD5 both of whom are senior and distinguished accountants and have been in practice since 1976 that the term 'goodwill' calculated according to the 'surplus-method' refers to the value of the entire firm.

[43] It was also a finding of fact made by the trial judge in rejecting the appellant's claim that the assets of the firm belonged to the appellant and the first defendant exclusively. From the facts of this case, it was indisputable that the assets of the firm belonged to all the partners of the firm. A careful perusal of the record of appeal would show that there was more than sufficient evidence before the trial judge to make such a finding. As such we agree with the Court of Appeal that such a finding of fact does not warrant any appellate intervention.

[44] The appellant himself had accepted the recommendations of the AA Report dated 3 October 1986 without qualification as evidenced by his own letter dated 7 October 1986 which stated:

My dear En. Zain,

I thank you for your letter dated 3 October 1986 together with a copy of the Report by Arthur Anderson & Co.

I am glad to inform you that I accept the recommendations made therein and agree that the same be implemented upon the Report being accepted by all the other partners.

With best regards.

Yours Sincerely,

SD

MOHAMED ISMAIL

[45] The appellant is therefore estopped from denying that he is bound by what he himself had agreed to (see *Boustead Trading (1985) Sdn Bhd v Arab-Malaysian Merchant Bank* [1995] 3 MLJ 331).

[46] On 22 November 1986, all the partners of the firm at the material time had agreed to the AA Report recommendation dated 3 October 1986 (see 4 AR 954–974) subject to the reservation that in the event the value of the share of the retiring partner at the time of the retirement was lower than its value at the time of acquisition (ie on his admission to the partnership) the deficit need not be paid by the retiring partner, provided his retirement was after two years of his admission into the partnership. This is also evidenced by the appellant's own letter dated 5 August 1987 (see 4 AR 797–801).

[47] The LYK Report which is a later report (1995) seems to comment adversely on the AA Reports. It was for the trial judge to have assessed the reports and made his finding. In this appeal we do not have the advantage of looking at the grounds of judgment of the trial judge as there was none and he had since passed away. However, we have the grounds of judgment of the Court of Appeal which had endorsed the finding of facts of the trial judge. In its grounds of judgment the Court of Appeal had accepted the surplus profit method of valuation as opposed to the LYK Report. The Court of Appeal had discharged its duty as an appellate court by providing a detailed and fully reasoned grounds of judgment for its findings.

[48] We agree with the submission of learned counsel for the respondents that the AWS Report, the AA Report and the AA goodwill computation as at 1 January 1989 were not done specifically for court proceedings. They were commissioned by the partners of the firm at the material time for a specific purpose of the partnership. These reports were done well before the appellant commenced his legal proceedings.

[49] As opposed to the three reports, the LYK Report was prepared by a

witness ('SP2') for the appellant for the purpose of court proceedings to give 'expert evidence' for the appellant. As SP2 had not prepared a written report at that stage, the learned trial judge directed him to do so as a matter of expediency. It is also trite law that the trial judge who had the advantage of observing the demeanour of the witnesses would be in a better position than an appellate court to assess the value of the evidence given, and the appellate court should be slow to interfere with the trial judge's findings.

[50] As the apex court, it is trite law that we are entitled to review the whole evidence before the court in totality to prevent any injustice. We have therefore also taken into account the LKY Report and considered it against the AWS Report and the AA Reports. In the final analysis we are in agreement with the reasonings given by the Court of Appeal.

[51] We have also perused the appeal record, the grounds of judgment of the Court of Appeal and the submission of counsel for both parties and it is our considered view that the findings of facts on the valuation of the firm based on the surplus profit method by the trial judge as endorsed by the Court of Appeal are not in error. As such, there is no merit for appellate intervention on these findings of facts in the instant appeal, (see *Gan Yook Chin (P) & Anor v Lee Ing Chin @ Lee Teck Seng & Ors* [2005] 2 MLJ 1).

[52] We would therefore answer the first question by saying that the AWS Report dated 18 November 1985 is a valuation of all the other assets of the firm including goodwill.

[53] We also answer question number two in the affirmative in that the Court of Appeal had given its reasoned decision on the issues raised in the said reports.

[54] For the above reasons, we would therefore dismiss this appeal with costs.

Appeal dismissed with costs.

Reported by Afiq Mohamad Noor